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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANA RICHARD ARNOLD,

Defendant and Appellant.

G051330

(Super. Ct. No. 14HF2655)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed.

Lindsey M. Ball, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Dana Richard Arnold of attempted robbery (Pen. Code, §§ 211, 212.5, subd. (c), 664, subd. (a); all statutory references are to this code) and commercial burglary (§§ 459, 460, subd. (b)). Arnold contends the trial court erred by instructing the jury on flight (CALCRIM No. 372) because there was insufficient evidence he fled after committing a crime. For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of September 26, 2014, Chamithri Adikarige, a Laguna Beach bank teller, returned to her station after a break and invited a male individual in line to approach her window. He wore a hat, a long-hair reddish wig, pink sunglasses, and a T-shirt. Adikarige could see only his skin and lips clearly. He passed her a note that read: “God sent me armed and willing and I’ve done my homework so be smart and slide me all of your normal 50’s and 20’s in a calm manner until I signal. Then say ‘have a good day’ with a smile and go tell your manager aloud ‘I have to use the bathroom now!’ and go do it for 5 minutes. Bless you, soul of God.”

Adikarige left her station, and informed the manager she was going to the bathroom. The would-be robber took back his note and walked out of the bank. Bank customer Boyd Schultz realized something was amiss and followed the person out of the bank. Schultz described the person as having a distinctive “robot walk” and watched him enter a public restroom. Schultz waited outside the restroom. A few minutes later, Arnold emerged from the restroom wearing a red shirt and shorts. No one else had come out of the bathroom. Arnold walked in the same robotic manner. Schultz asked a man standing outside the restroom to check if there was anyone else in the bathroom. The man checked and said the bathroom was empty.

Schultz followed Arnold and yelled “hey” at him three times. Arnold did not stop. Two police officers approached and Schultz directed them to Arnold, who they detained. Arnold wore a mostly empty backpack.

Schultz said Arnold and the person in the bank shared the same height and build. Adikarige said Arnold’s lips were similar to the robber’s.

Investigators searched the bathroom and found a wig and a T-shirt stuffed in a toilet, and a pair of cargo pants and black tennis shoes underneath the same toilet. The front pants pocket contained six envelopes. The robber’s note was written on one of the envelopes. Fingerprints on the note matched Arnold’s.

Following trial in December 2014, a jury convicted Arnold as noted above. The trial court suspended imposition of sentence and placed Arnold on probation on various terms and conditions, including 365 days in custody.

II

DISCUSSION

The Trial Court Did Not Err By Instructing the Jury on Flight

Arnold contends the trial court improperly instructed the jury it could infer guilt from flight. The court gave CALCRIM No. 372: “If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.” Arnold complains the evidence did not support the instruction, arguing the instruction permitted the jury to erroneously infer his walking away from a bathroom at a normal pace indicated he was fleeing from the scene of the crime when no such reasonable inference was possible. He explains: “Schultz testified to observing appellant leave and walk away from the public restroom as Schultz yelled, ‘Hey!’ in appellant’s direction. Without proof appellant

intended to evade Schultz or detection in some way, the evidence was insufficient to permit the jury to infer appellant was conscious of his guilt based on evidence of flight.”¹

The trial court correctly instructs on flight “““where the evidence shows the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.””” (*People v. Smithey* (1999) 20 Cal.4th 936, 982; *People v. Cannady* (1972) 8 Cal.3d 379, 391 [flight requires neither the physical act of running nor the reaching of a far-away haven].) Here, the evidence supported the instruction. The jury could infer Arnold recognized Schultz from inside the bank and walked away from him to avoid being identified as the robber. Arnold focuses only on the period of his leaving the restroom, but the jury was entitled to consider the totality of circumstances in determining whether Arnold heard and failed to respond to Schultz’s entreaties, and whether this reflected a purpose to avoid detection and arrest.

Arnold’s reliance on *People v. Crandell* (1988) 46 Cal.3d 833 (*Crandell*) is misplaced. There, uncontradicted evidence showed the defendant left the crime scene after the homicides for reasons other than fear of immediate apprehension and with the intention to return to dispose of the bodies. *Crandell* noted flight “manifestly does require, however, a purpose to avoid being observed or arrested. [¶] Although defendant left the [victims’] house without reporting the deaths of [the victims] and with the purpose of concealing their deaths, and although this conduct supported an inference of consciousness of guilt, his leaving was not flight in the absence of any evidence from

¹ He also faults the prosecutor’s argument for the same reason. The prosecutor argued: “[Schultz] was able to recognize essentially the same walk, the same style of walk, for lack of a better term, the kind of focused robotic nature that the suspect in the bank walked, the manner that he walked in toward the restroom, as well as the way that that same person now leaving the restroom is walking away from the crime scene trying to get away.” Later the prosecutor continued: “It’s not a coincidence that the defendant being in the right place where a disguise has just been discarded. It’s no surprise that he had a different change of clothes is now heading away from the crime scene toward his car to try to essentially get away from the crime scene and get away from this crime. Again, showing flight.”

which a jury could reasonably infer that he left to avoid being observed or arrested. Defendant did not leave to avoid being observed (his presence at the house on the morning following the murders was already known to Juan Salazar, among others) and he did not expect the crimes to become known before his intended return. He left to accomplish specific tasks and with the intent of returning to dispose of the bodies. There is no evidence he ever wavered in this intent; indeed, he was arrested while returning and less than a block from the [victims'] house.” (*Id.* at pp. 869-870.) In contrast, the evidence here supported an inference of flight.

In any event, any error in this case was harmless. As *Crandell* notes, “the instruction did not posit the existence of flight; both the existence and significance of flight were left to the jury.” (*Crandell, supra*, 46 Cal.3d at pp. 869-870; *People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Clem* (1980) 104 Cal.App.3d 337, 344.) We disagree with Arnold the prosecution’s case against appellant was a “close one.”² Schultz tracked the robber into the bathroom and saw Arnold emerge. No one else was in the restroom after Arnold came out. The robber abandoned his disguise in the bathroom. Arnold’s physical features matched those of the robber. Arnold’s fingerprints were found on the robbery note. The evidence of guilt was overwhelming.

² Arnold argues the witnesses could not positively identify him and the fingerprint evidence established only that his hand touched the robber’s note at some point. He suggests, “Facing financial hardship, appellant may have checked the cargo pant pockets for cash.” He notes there was no fingerprint evidence from the teller window or the bank entrance, and Schultz erroneously recalled Arnold wearing the same shoes as the robber even though there were shoes in the bathroom stall along with the rest of the disguise.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.